IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 7TH JUNE 2007 / 17TH JYAISHTA 1929

WP(C).No. 1971 of 2005(I)

AGAINST THE ORDER DATED 20/08/2004 IN EA.60 & 61/03
IN EP.94 OF 1989 IN OS.23/1980 of SUB COURT,KOTTARAKKARA

.....

PETITIONER:

C.G.THANKACHAN, S/O. GEORGE,
CHARACKAL PUTHEN VEEDU,
OOMMANNOOR P.O., KOTTARAKKARA.

BY ADV. SRI.S.ABDUL RAZZAK

RESPONDENTS:

---

1. THE SOUTH INDIAN BANK LIMITED,
REPRESENTED BY ITS DEPUTY GENERAL MANAGER,
REGISTERED OFFICE, THRISSUR.

*2. M/S. CHITRAS, TEXTILE DEALERS,
MAIN ROAD, MARTHANDAM, K.K.DISTRICT, TAMIL NADU.

*3. K.S.PANKAJAMMAL, W/O. SREENIVAS REDDIAR
SREE NIVAS, JAYANTHA STREET, R.V.PURAM,
NAGERCOIL, TAMIL NADU.

*4. SMT.AZHAKAMMAL LESHMIKANTAM @ HEMALATHA
W/O. S.RAMANUJAN, M/S.CHITRAS) SREE NIVAS,
R.V.PURAM, NAGERCOIL, TAMIL NADU.

*5. SRI.S.RAMANUJAN,
TEXTILE DEALER S/O. SREENIVASA REDDIAR,
SREENIVAS, JAGANATHA STREET,
R.V.PURAM, NAGERCOIL, TAMIL NADU.

* RESPONDENTS 2, 3, 4 AND 5 ARE DELETED FROM THE ARRAY OF PARTIES AS PER ORDER DATED 19.1.2006 IN THE WRIT PETITION.

R1 BY ADV. SRI.K.PRABHAKARAN, SC, SOUTH INDIAN BANK

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.1971/05

APPENDIX

PETITIONER'S EXTS:

EXT.P1 – PHOTO COPY OF 5TH DEFENDANT'S DEATH CERTIFICATE DT.3.1.85

EXT.P2 – PHOTO COPY OF JUDGMENT IN O.S.26/80 DT.21.12.85.

EXT.P3 – PHOTO COPY OF ORDER DT.31.5.91 IN E.A.258/91.

EXT.P4 – PHOTO COPY OF 6TH DEFENDANT'S DEATH CERTIFICATE DT.19.3.03.

EXT.P5 – PHOTO COPY OF EA.61/04 FILED BY PETR. FOR REVIEWING THE JUDGMENT AND DECREE DT.21.12.85.

EXT.P6 – PHOTO COPY OF ORDER DT.20.8.04 IN EA.60 AND 61/03 IN EP.94/89 IN O.S.23/80 OF SUB COURT, KOTTARAKKARA.

EXT.P7 – PHOTO COPY OF SALE PROCLAMATION WITH SCHEDULE DT.13.12.04.

/TRUE COPY/

PIUS C. KURIAKOSE, J.

.....

W.P.(C)No.1971 OF 2005

.....

DATED THIS THE 7TH JUNE, 2007

J U D G M E N T

One of the legal representatives of defendants 5 and 6 in a suit for money which was instituted by the 1st respondent-Bank, both for a personal decree against a few defendants and also by sale of the immovable properties mortgaged as security for the loan has filed this Writ Petition under Article 227 of the Constitution of India, impugning Ext.P6 common order passed by the execution court. Apart from the petitioner's parents who were defendants 5 and 6, the suit was instituted against respondents 2 to 5 also. In fact, the 2nd respondent, a textile firm having business places at Marthandam and Nagarcoil in Tamil Nadu was the principal borrower in the loan transaction and respondents 3 to 5 who were partners of the principal borrower-firm were guarantors to the transaction. The immovable properties belonging to respondents 4 and 5 (who were defendants 3 and 4 in the suit) were equitably mortgaged by them as security for the loan. The petitioner's parents purchased an item of those immovable properties from respondents 4 and 5 during the subsistence of the mortgage and hence they were impleaded in the suit as defendants 5 and 6. No

personal decree was sought against the parents of the petitioner. They were impleaded as persons in wrongful possession of the mortgaged properties.

2. The petitioner's parents entered appearance before the trial court through advocate and filed a written statement raising several contentions including the contention that the equitable mortgage relied on by the 1st respondent-bank was not real. Respondents 4 and 5, the mortgagors filed a separate written statement in which several contentions were raised, but execution of the equitable mortgage was not denied. The parents of the petitioner did not pursue their defence. The suit was decreed by the trial court on appreciation of the documentary evidence adduced by the 1st respondent-plaintiff and the contesting defendants. No personal decree was passed against the parents of the petitioner. But a charged decree for a sum of Rs.19,815.70 together with interest from the date of suit at 17.5% per annum was passed against all the mortgaged properties. The case of the petitioner is that his father, the 5th defendant in the suit died on 31.12.1984 and Ext.P1 death certificate is relied on in that context. The 5th defendant's death was not noticed by the court and the suit was decreed by Ext.P2 judgment dated 21.12.1985 as if he was alive

at that time. Execution petition was filed by the bank and when it was reported on the execution side that the 5th defendant is no more, the bank filed E.A.258/1991 for impleading the petitioner and other legal heirs of the deceased 5th defendant and the said application was allowed. The petitioner's mother, the 6th defendant also died on 11.3.1993. Contending that the decree is a nullity since the same was passed against a dead person, viz., George, the 5th defendant, the petitioner-son of 5th defendant filed Ext.P5 application for review on 22.2.2003 along with a separate application for condonation of the delay caused in the matter of Ext.P5. The execution court passed Ext.P6 common order and dismissed both the applications. It is Ext.P6 which is under challenge in this proceeding. The petitioner also seeks a declaration that Ext.P2 judgment and the decree thereunder is a nullity and despite the charge created, the decree is not executable against the petitioner or the other legal heirs of deceased 5th defendant.

3. Sri.S.A.Razzak, counsel for the petitioner addressed me elaborately. I have also heard the submissions of Sri.K.Prabhakaran, Standing Counsel for the decree-holder-bank.

4. Mr.Razaak would submit that it is trite that decree passed

against a dead person is a nullity and that the contention that the decree is a nullity can be urged at any stage of the proceedings including execution stage. The learned counsel would rely on the judgment of the Supreme Court in **Sarwan Kumar v. Madan Lal Aggarwal** [(2003) 4 SCC 147] to argue that a contention that the decree itself is null and void and therefore non-executable is a contention which can be raised before the execution court. Mr.Razaak relied also on another judgment of the Supreme Court in **Sardar Amarjit Singh Kalra v. Pramod Gupta** [(2003) 3 SCC 272) to argue that this was a case where the court committed the wrong of passing a decree against a dead person and therefore the principle underlying the maxim actus curiae neminem gravabit which means that no party shall be allowed to suffer on account of a wrong committed by the court should be applied.

5. All the submissions of Mr.Razaak were resisted by Mr.K.Prabhakaran, learned Standing Counsel for the 1st respondent-Bank who submitted that there is no warrant at all for setting aside Ext.P6 common order in the visitorial jurisdiction of this Court under Article 227 of the Constitution. Ext.P6, according to the learned Standing Counsel, is a well reasoned order wherein the court below

has rightly noticed that defendants 5 and 6, the father and mother of the petitioner, held A and B schedule properties in the suit in equal moieties and that even if it is true that the 5th defendant had died during the pendency of the suit, his interest in the properties in question was represented by the 6th defendant, the mother who died only long after the passage of the decree, i.e., on 11.3.1993, which is during the pendency of the execution petition (E.P.No.94 of 1989) filed by the bank. Mr.Prabhakaran also submitted that it is admitted by the petitioner that he and the other legal heirs of the deceased 5th defendant were impleaded as additional parties in the execution petition on 31.5.1991 vide order in E.A.No.258 of 1991. It is those additional judgment-debtors who are arrayed in the review petition by the petitioner as respondents 7 to 11. The order impleading them and the petitioner as legal representatives of the deceased 5th defendant having attained finality, it was not open to the petitioner to seek review of the judgment on 21.12.1985, contending that the decree is a nullity and that he came to have information about the void character of the decree only in 2004 when the property in question was put to sale by the bank.

6. I have considered the rival submissions made at the Bar. It

was conceded before me that no personal decree had been sought for against the parents of the petitioner who were defendants 5 and 6 in the suit. They were arrayed in the suit as alienees of plaint schedule items 1 and 2 during the subsistence of the mortgage in favour of the 1st respondent-bank. Ext.P2 is the judgment in the suit. Ext.P2 will show that defendants 3 and 4, the mortgagors had not denied execution of the mortgage in favour of the bank. Defendants 5 and 6 who had entered appearance through Adv.Sri.Velayudhan Pillai did file a written statement wherein two serious contentions, viz., bar of limitation and denial of the mortgage, are raised. But it is to be noticed immediately that the contention of denial of mortgage could not have been responsibly raised by them who could claim any right over the properties only under the mortgagors who never denied the mortgage. In that view of the matter, the contention regarding limitation was also liable to be repelled by the trial court. Ext.P2 will show that apart from filing the written statement, the 6th defendant who was admittedly alive when the suit came up for trial did not pursue the contentions raised in the written statement. In fact, even if she had pursued the contentions, it would have been almost impossible to substantiate the contention that there was no valid

mortgage in as much as the mortgagors had admitted the existence of the mortgage. The same was the position regarding the contention of limitation also.

7. In deference to the submissions of Mr.Razaak, I will consider the argument that the decree is a nullity. As already indicated, it is not a personal decree which is passed against defendants 5 and 6. In fact, personal decree was not even asked for. What was asked for was only a decree by sale and the junction of defendants 5 and 6 was only in their capacity as alienees of the mortgaged properties. On the terms of the mortgage, alienation without the knowledge of the bank was prohibited. Yet the bank impleaded defendants 5 and 6 lest there should be obstructions in execution. The properties in question were admittedly held in equal moieties by defendants 5 and 6. When the 5th defendant died, naturally the estate devolved on 6th defendant. Even if it is assumed that the 6th defendant was only one of the legal heirs of the 5th defendant who was having her own absolute interest in a portion of the property, then also the interest of the other legal heirs of the 5th defendant was represented in the suit by her. After all, there is no conflict between the interest of the 6th defendant and the other legal heirs of the deceased 5th defendant including the present

petitioner. Even otherwise, the case of the petitioner that he came to know about the passage of a decree against his father after he was dead, only in 2004 can be swallowed only with a pinch of salt. It is conceded in the Writ Petition itself that on 31.5.1991 vide order in E.A.258 of 1991, the petitioner and the other legal heirs of the deceased 5th defendant were brought on record as additional parties in the E.P. The Review Petition is filed only on 22.2.2003, so many years after the order in E.A.258 of 1991. The learned Subordinate Judge was perfectly correct in his view that the application for condonation of the delay of 6250 days was liable to be rejected.. Section 5 of the limitation Act states that the said Section does not apply to execution applications.

8. The challenge against Ext.P6 fails and the Writ Petition will stand dismissed. However, considering the submissions of Mr.Razaak that the petitioner and the other legal heirs of the deceased 5th defendant and the 6th defendant are in impecunious circumstances and that the real beneficiaries of the loan advanced by the bank are in affluent circumstances and that the bank is not proceeding against the properties belonging to those defendants which were also decreed to be sold, even as I confirm Ext.P6, I direct the bank to simultaneously

proceed against the properties belonging to judgment-debtors 1 to 5 and also to consider a representation to be submitted by the present petitioner for a final settlement of the liabilities of the legal heirs of defendants 5 and 6 under the decree, provided the principal amount decree, i.e., Rs.19,815.70, together with interest thereon at the rate of 9% per annum till date of actual payment is offered by them within three months of receiving copy of this judgment, sympathetically. It is however clarified that the above benefit is intended to be conferred only on the legal heirs of deceased defendants 5 and 6 and in respect of the properties which are covered by the title documents in the names of defendants 5 and 6.

(PIUS C.KURIAKOSE, JUDGE)

tgl